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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-741

JESSE KETCHUM,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The judgment of conviction entered against the petitioner in the New York Supreme Court, Erie County, on October 26th, 1973 (unreported; entered on jury verdict) was unanimously affirmed, without opinion, by the Appellate Division of the New York State Supreme Court, Fourth Judicial Department, on June 27th, 1974, reported at 45 A.D.2d 820. The memorandum of the the New York State Court of Appeals, unanimously affirming the order of the intermediate appellate court, is reported at 35 N.Y.2d 740 (October 23rd, 1974).

Jurisdiction

Jurisdiction is sought by petitioner pursuant to Title 28, United States Code, Section 1257, Subdivisions 2 and 3. The order and judgment of the New York State Court of Appeals, the highest state court in which review may be obtained, was entered on October 23rd, 1974. There was no indication that the constitutional issues raised on this petition for certiorari were considered by that court. While objection was made to cross examination of a defense witness, and specific objections were addressed to the prosecutor's summation, it was never asserted that the errors complained of were of constitutional dimension until the matter reached the state appellate court. No motion was made or granted to amend the remittitur to indicate that a question under the Constitution of the United States was necessarily passed upon by the New York State courts.

The petition for a writ of certiorari was docketed in the Supreme Court of the United States on December 12th, 1974. The typewritten petition was received by the office of the District Attorney of Erie County on December 16th, 1974; printed petitions were received on December 20th, 1974.

Questions Presented

1. Where the statute in question has been defined in specific terms, and where the criminal behavior proscribed is couched in language adjudicated to be readily understandable through common usage and historical precedent, and where the proof presented at trial established that the death occurred through the employment of an unacceptable surgical procedure, at an unacceptable time, in unacceptable circumstances and through total failure to provide obviously necessary medical assistance, was there a constitu-

tionally permissible application of that statute to this petitioner?

2. Where the decision of the state court was clearly correct, based upon an interpretation of the facts presented at trial, is it unnecessary for this Court to review the decision which turned on its own unique facts and would affect few litigants other than the instant petitioner?

3. Should this Court refuse to exercise jurisdiction with reference to errors claimed to have occurred on cross examination and summation where petitioner failed to object to those errors on constitutional grounds and, thus, has not discharged his burden of proving that the state court determined that issue on constitutional grounds?

Statement of the Case

The petitioner was indicted by an Erie County Court Grand Jury on January 27th, 1972 charged, in two counts, with Manslaughter in the Second Degree and Criminally Negligent Homicide. After arraignment, motions to dismiss the Indictment on the grounds that it was fatally defective in form and content and based upon defective Grand Jury proceedings, for suppression of scientific reports and evidence, to determine if electronic surveillance was utilized, and for material favorable to the defense, were made and determined. A further motion to dismiss the Indictment on the ground, *inter alia*, that the statute defining the crime charged was unconstitutional, was denied, as was a motion to suppress physical evidence. A motion for Bill of Particulars, requesting a description of the precise circumstances and elements alleged to constitute reckless or criminally negligent conduct, was granted. Such Bill of Particulars was supplied. Motion to suppress petitioner's oral statements was denied after a hearing.

Trial of the Indictment commenced on September 5th, 1973 and continued through October 3rd, 1973, when the jury returned its verdict finding petitioner not guilty of Manslaughter in the Second Degree, as charged in the first count of the Indictment, and guilty of Criminally Negligent Homicide, as charged in the second count. The petitioner was sentenced, on October 26th, 1973, to an indeterminate term of imprisonment not to exceed three years.

On appeal to the Supreme Court, Appellate Division, Fourth Judicial Department, the judgment of conviction was unanimously affirmed, without opinion. That order of affirmance was unanimously affirmed by the Court of Appeals.

Petitioner was released on bail at arraignment; execution of sentence has been stayed pending determination of this petition.

Facts

Petitioner's conviction arose out of the following facts:

Margaret Louise Smith was from fifteen to twenty-four weeks pregnant (166, 167, 206, 497, 1148)[1] when she came to Buffalo in June, 1971, to terminate her pregnancy by abortion (404). Billy Ray Ellenburg, with whom she had lived for a year and one-half, accompanied her to petitioner's office at nine-thirty a.m. on June 16th (419). He paid five hundred dollars, in advance, for the abortion (417).

When Ellenburg returned to petitioner's office at noon, he found Mrs. Smith alone in a room, covered with a bloody blanket (419, 423). There were puddles of blood on the

[1] Numerals in parentheses refer to pages of the Record on Appeal to the New York Court of Appeals.

floor and all over her legs (424). In the thirty or forty minutes that he was there, the bleeding continued and blood poured off the bed (425). He was assured by the receptionist that the profuse bleeding was normal; petitioner did not enter the room (426).

Ellenburg saw Mrs. Smith again at two p.m. She was much paler, spoke weakly, had difficulty breathing, and was very hot (429, 452). Ellenburg demanded petitioner's presence in that room; petitioner said that Mrs. Smith was alright; Ellenburg next saw her when the Rescue Squad brought her out of the office (431, 432).

The receptionist, JUDITH HASSETT, testified that she was employed by petitioner for three weeks as of June 16th, 1971 (459, 460). Her duties were to keep the office clean, answer the telephone, book appointments, and give the patients a form to complete when they arrived (459, 461). She was never instructed to check on pulse or blood pressure after an operation and she did not know the symptoms of shock (467, 468). She had no medical or nursing training (460). It was her duty to take money from patients, which she placed on the sheet in the patient's clinic room (469).

Mrs. Hassett said that Mrs. Smith complained of back pains when she entered the room with Ellenburg (516). Mrs. Hassett changed the bloody sheet under the patient (518, 519). There was blood on the sheet covering Mrs. Smith and there was blood on the table, dripping to the floor (523). The patient was bleeding to an extent that worried Mrs. Hassett, who summoned petitioner (516). He was busy (517). Mrs. Hassett, then called petitioner's wife into the room. Mrs. Ketchum then summoned petitioner immediately. He finally came into the room (517, 518). Shortly thereafter petitioner stuck his head out and shouted

for Mrs. Hassett to get the Rescue Squad as fast as possible (527).

There were no signs of life in Mrs. Smith when the Rescue Squad arrived (604). No tracheotomy had been performed; there was no blood supply or intravenous feeding; petitioner's oxygen tanks were empty (605, 612, 648). Mrs. Smith was pronounced dead on arrival at Buffalo General Hospital.

Police witnesses who investigated this matter testified to the bloody condition of the room from which Mrs. Smith had been taken: blood was apparent on the floor and walls, dripping from the table which was still covered with the bloody sheet (862, 868, 896). Petitioner informed the police that her heart stopped while he was performing the operation (850, 871-872, 875-876, 890, 953). He had not administered any blood (954).

Expert medical testimony established that the victim suffered a through and through tear in the whole cervix and lower part of the uterus, extending into the broad ligament (1141-1143). There was a surgical cut; the tear resulted from pressure on the uterus from the head of the fetus in the area of least resistance, *i.e.*, where it was cut (1146). The cut was sutured, but the tear was not (1150). Margaret Louise Smith bled to death from this tear in the uterus and cervix (1159, 1279, 309, 767). The damage done to her body would cause death in two to ten hours (1156); if the tear had been recognized, her life would have been saved easily, by performance of a hysterectomy through abdominal incision (1157-1158).

There was testimony that petitioner told the Erie County Medical Examiner that he had performed a vaginal hysterotomy on Mrs. Smith, completed at ten thirty a.m., consisting

of an incision in her cervix and manual extraction of the fetus (359).

The bulk of the prosecution testimony consisted of proof that the abortional procedure used by petitioner was medically improper, that the pregnancy was too far advanced to be aborted in an office, that the procedure used was a major surgical procedure that should not have been performed in an office, and that the great danger of excessive bleeding following this particular abortional procedure required careful after-care, which was totally lacking in the instant case.

It was established that while the *legislature* did not set standards for abortion surgery, medical standards did exist for proper performance of abortion. There was testimony that vaginal hysterotomony is a surgical procedure (373) that is contraindicated after twelve weeks of pregnancy (385-387). No surgical procedure of abortion should be performed outside of a hospital (387). Vaginal hysterotomy is a totally unacceptable procedure in modern obstetries (1366-1367, 1384). It is a procedure of historical interest, mentioned in textbooks only to condemn it (763). According to medical standards in Erie County, New York State and the entire United States, only abdominal hysterotomy, saline injection or hysterectomy in a hospital are available operations past the first trimester of pregnancy (758, 759, 761, 762, 1016, 1018). Obstetrical and gynecological standards forbid the performance of abortion, by any method, outside of a hospital after twelve weeks of pregnancy because of the danger of an incision tearing and being difficult to see, resulting in great danger of hemmorrhage (760, 1114).

Medical standards of proper after-care were established on this record. Close observation is required for any signs of bleeding, by the physician or a specially trained nurse (774, 1035, 1021), as well as frequent periodic checks on blood pressure, pulse rate, respiratory rate, urine output and other vital signs (775, 1368, 1370, 1035, 1021). Visual flow of blood at noon (following a morning operation) would be highly significant (777); reasonable standards would dictate immediate preparation for transfer of the patient to a fully equipped hospital and the start of intravenous fluids, medication to contract the uterus, and administration of a blood substitute (1370, 1371). The ultimate requirement would be replacement of the lost blood and stoppage of the flow of blood (778). Petitioner's conduct was not a reasonable and prudent doctor's method of operation (784, 785).

The thrust of the defense proof was that neither vaginal hysterotomy nor any major surgery was performed on the victim (1478, 1503, 1720, 1724). Contrary to the prosecution proof that Mrs. Smith slowly bled to death in the absence of any curative action by petitioner, a defense theory was advanced that she died of an amniotic fluid embolism (1500, 1701, 1903). One defense doctor said that this is an emergency condition beyond the control of the physician (1500, 1501); another did not believe that the death was an instantaneous catastrophic event that occurred within one to thirty minutes (1865). Still another defense witness opined that one of a number of possibilities of death was hemorrhagic diathesis of intravascular coagulation, with or without amniotic fluid (1969, 2004).

REASONS FOR OPPOSING THE WRIT

POINT ONE

Section 125.10, Penal Law, was constitutionally applied to petitioner.

Although petitioner attempts to raise the question of the constitutionality of Section 125.10, on its face, that issue was not argued in the state courts (Appellant's Brief to Court of Appeals, page 4; Appellant's Reply Brief, pages 2-3). That statute, in conjunction with Section 15.10(4), New York Penal Law, survives a challenge to its constitutionality on the ground of vagueness in that the term "criminal negligence" is understandable through common usage and historical adjudication (*People v. Angelo*, 246 N.Y. 451; *People v. Eckert*, 2 N.Y.2d 126); it employs words well enough known to those within its reach to correctly apply them (*Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502); there is a well-settled common law meaning, notwithstanding an element of degree in definition as to which estimates might differ (*Nash v. United States*, 229 U.S. 373, 376). The constitutionality of the statute has been upheld by New York State courts, in a manner not inconsistent with the rulings of this Court (*People v. Haney*, 30 N.Y.2d 328; *People v. Kealey*, 33 N.Y.2d 818, cert. den. 415 U.S. 920).

Petitioner's repeated references to application of the statute to "drunk driving" cases are irrelevant to the disposition of this matter. The statute is not directed exclusively against vehicular homicides; it has been applied in diverse fact situations; see, *e.g.*, *People v. Henson*, 33 N.Y.2d 63 (battered child syndrome). In any case, the question not having been presented for decision to the New York Court of Appeals, there was no federal question of the

constitutionality of the statute on its face which is preserved for review by this Court (*Honeyman v. Hanan*, 300 U.S. 14).

Insofar as the question of the constitutionality of Section 125.10, as applied to this petitioner, was raised in the state courts, it is not clear that a definite issue of the validity of that statute was decided. Rather, the argument was based on the *construction* of the statute: whether the Indictment and Bill of Particulars, when read together, adequately apprised the petitioner of the crime with which he was charged; whether sufficient testimony was presented at trial to constitute the elements of the crime charged. Indeed, it is this basic fact question that is still being argued on this petition. Respondent, therefore, objects to review of the determination of the New York Court of Appeals on this issue on the ground that the question of the construction of a state statute is not a federal question (*Louisville & N.R. Co. v. City of Louisville*, 166 U.S. 709; *Honeyman v. Hanan*, *supra*). At the very least, the state decision could have rested on a question of the construction of the statute rather than on its validity. There being that possibility, and there being no showing to the contrary, this Court is without jurisdiction to review the state determination (*Stembridge v. State of Georgia*, 343 U.S. 541, 547; *Bachtel v. Wilson*, 204 U.S. 36; *Southwestern Bell Tel. Co. v. State of Oklahoma*, 303 U.S. 206, 212, 213).

In the alternative, if the New York courts decided a constitutional question, that question was properly decided. The Indictment itself was sufficient to inform the petitioner of the conduct deemed criminal, in that it was couched in the language of the statute, which has been held constitutional, as amplified by specific verbiage on the face of the Indictment and more specific information contained in the Bill of

Particulars and minutes of testimony before the Grand Jury. The argument, at the trial level, was not that the specific conduct was unknown, but that it was difficult to isolate in the face of a voluminous quantity of testimony (2794, paragraphs 55, 56).

The argument, that this record lacks proof of pre-existing standards for the performance of an abortion, is without merit, and belied by the record. While it is true that no statute details the proper method of any surgical procedure, this record is replete with proof of *medical* standards, existing at the time of the operation in issue, which were grossly violated by petitioner. No statute exists which details the factual elements necessary to sustain a charge of vehicular homicide or which establishes the precise degree of negligence which renders one culpable in the death of an infant. The law need not be so precisely drafted so long as proof exists in a given case of standards of reasonable behavior. Such proof exists in large measure on this record. There is a volume of medical testimony establishing the medical and surgical standards existing in Erie County, New York State and the *entire United States* (761, 762), not only for abortion, but for surgical procedures as a whole. The proof that this petitioner utilized a surgical procedure that was condemned by medical authorities on two continents establishes the lack of danger of this petitioner having been left to the mercy of local physicians. Additionally, proof of the complete inappropriateness of this operation at the stage of gestation and under the conditions existing was uncontraverted: the chief defense witness did not perform vaginal hysterotomies after the first trimester of pregnancy; he would not perform a post-thirteen week abortion in an office (1575, 1576, 1573).

And more than improper procedure at an improper time in an improper setting was shown: no witness on this trial could countenance the total and absolute lack of after-care of the patient. No vital signs were checked and no notice was taken of profuse and visible blood loss. No one was even minimally trained in this basic and primary requirement. This petitioner stands convicted, not because he performed an abortion, not because of hostile competing doctors, not because of an emotional community, but because he performed a surgical procedure fraught with danger and, when the obvious danger was manifest, he allowed this young woman to bleed to death. Can it seriously be argued that there is no proof on this record of gross deviation from acceptable medical standards? There is proof on this record of gross deviation from the most basic human standards.

Finally, the argument that no vaginal hysterotomy was performed is not worthy of this Court's cognizance as it is a pure question of fact: defense doctors Vuitch and Petty said there was no vaginal hysterotomy; the petitioner himself admitted that he performed a vaginal hysterotomy; prosecution witnesses were satisfied that a vaginal hysterotomy had been performed (1478, 1720, 359, 763). Resolution of this issue was for the trier of fact: it is not of constitutional dimension.

POINT TWO

No error, reviewable by this Court, occurred through the conduct of the prosecutor.

a. No reviewable error occurred in summation.

There was objection raised to the prosecutor's summation immediately upon its conclusion. Objection, and motion for mistrial, was taken to five specific statements (2353-2354). Only one of the statements was pursued in the appellate process, *i.e.*, the prosecutor's reference to the law having been changed because of petitioner's incident.[2] While other allegations of error might have been considered by the intermediate appellate court, in the exercise of its plenary powers, it was procedurally impermissible for the New York Court of Appeals to have considered any error other than that specifically objected to on trial (*People v. Broady*, 5 N.Y.2d 500, 514; *People v. James*, 24 A.D.2d 608, aff'd 17 N.Y.2d 552; *People v. Gitlow*, 195 App. Div. 773, 798, aff'd 234 N.Y. 132, aff'd 268 U.S. 652; *People v. Hartigan*, 210 N.Y. 144, 148; *People v. Pindar*, 210 N.Y. 191). It must be assumed, therefore, that the New York Court of Appeals confronted only the single allegation of error in summation that was preserved for its review. That single error is not sufficient to require review by this Court.

Respondent concedes that the prosecutor misspoke, at 2294, when he quoted Dr. Mosher as saying that "even as a result of that", *i.e.*, petitioner's performance of abortions in an office, "the law was changed." This is, however, the only reference on this voluminous record, *by the prosecutor*, to a change in the law resulting from petitioner's actions.

[2] Other allegations of error were raised in the appellate courts, but these had not been objected to at trial.

It was defense counsel who not only raised the fact of a change in the law, but it was he who connected the change to the date of this crime: in cross examining Dr. Mosher, defense counsel asked if the situation—of abortions in offices—wasn't rectified *after June, 1971* by the passage of a Sanitation Code (1120); see, also, 1120, 803, 804, 805. The prosecutor made no attempt to show a change in the law to have a bearing on petitioner's conduct. It does not appear that this single misstatement had any profound influence on the jury.

It is significant that the prosecutor went to some length to caution the jury that the law prohibiting abortions had been changed, emphasizing that petitioner was *not* being tried because he performed an abortion (2267-2268).

Further, and most important, there was no objection, *on constitutional grounds*, to any part of the prosecutor's summation (2352-2354). This want of proper presentation of a constitutional issue buttresses Respondent's position that the state decision sought to be reviewed did not rest on a constitutional basis. It is respectfully submitted, then, that this Court is without jurisdiction to consider the issue (*Bailey v. Anderson*, 326 U.S. 203, 207; *Street v. New York*, 394 U.S. 576, 581-582).

b. No reviewable error occurred on cross examination.

A lengthy and searching cross examination of Dr. Milan Vuitch, a defense witness, was conducted by the prosecutor following Dr. Vuitch's testimony that no vaginal hysterotomy had been performed, contrary to petitioner's admission, and that vaginal hysterotomy was a perfectly good operation, contrary to the opinions of American and British medical authorities. The prosecutor attempted to discredit the testimony of this witness—long the accepted purpose of

cross examination. Respondent is unaware of any rule prohibiting an attempt to impeach the credibility of a witness and does not equate such an attempt with a deprivation of a defendant's right to call witnesses in his own behalf.

Respondent vigorously asserts that the exchange with the witness, cited as error, was not occasioned by the prosecutor. It was precipitated by the perfectly proper question, "Have you been convicted, Doctor, for illegal abortions?" (1514). It was the witness who answered that he had been indicted, and spoke of erasure and conviction. It was defense counsel who spoke of irrelevance, overruling, vindication and convictions. It was defense counsel who finally asserted that the witness' convictions were reversed. Nowhere on this record does it appear that the witness had not been *convicted*. Respondent cannot accept responsibility for actual or constructive knowledge of the litigation history of a defense witness where it is very apparent that defense counsel had no knowledge. There is nothing on this record to indicate bad faith on the part of the prosecutor; defense ignorance of the background of its own witness cannot be imputed to the prosecution.

Any error which may have been occasioned by this line of questioning was vitiated by the trial court's instruction to the jury that the witness had no convictions (1516), based upon his belief that any convictions had been reversed. It was further vitiated by the testimony of Vuitch, *to which no objection was taken*, that he was performing abortions when it was illegal to do so (1520, 1476). The question of the retroactivity of the decisions of this Court concerning abortion is in no way raised on this record.

Further, no objection on *constitutional grounds,* was taken to any part of the cross examination by the prosecutor (1514-1516). The record does not disclose any basis for objection to the question, "As had Dr. Ketchum, you have had troubles with the law because of abortions, haven't you?" (1514), or even the portion of the question to which objection was made. The record does disclose that objection to questioning about a prior conviction was taken on the ground that it was, ". . . irrelevant, immaterial and highly prejudicial to the defense." (1515). Such objection falls far short of alerting the trial court to the presence of an issue of constitutional dimension. Again, this want of proper presentation of a constitutional issue forecloses review by this Court (*Bailey v. Anderson, supra; Street v. New York, supra*).

c. No "abuse" occurred at this trial.

It is contended before this Court that the prosecutor "verbally abused" the petitioner in that he commented on financial aspects of petitioner's practice and referred to him as a "carpetbagger". Not one of these comments was objected to at trial, on any basis. This alone is sufficient to remove the issue from the interest of this Court.

Additionally, contrary to the opinion expressed in the instant petition, these remarks were neither outrageous nor reminiscent of appeals to racial prejudice. The remarks were supported by the distasteful testimony on the record. Objection to "carpetbagger" is based upon a totally unfounded assertion of local prejudice: three of the prosecution witnesses were from Michigan, Ohio and Virginia; it was defense counsel who raised the claim that New York doctors don't like out-of-state doctors coming in and putting them out of business (2227).

The remarks now complained of were not sufficient to effect the verdict; they were not even sufficient to create objection at the trial. There having been no objection, there was no basis for review by the New York Court of Appeals, and no necessity for or propriety of review by this Court.

Conclusion

There was no quarrel on this trial with the legality of the abortion performed by petitioner. There was no attempt in this case to restrict the performance of abortions, to legislate, *ex post facto*, the manner and method of abortional surgery, to circumvent the rulings of this Court. The petitioner was held culpable for failing to perceive the risk of a woman bleeding to death following a surgical procedure destined to create such a risk and in the absence of the most minimal precautions against such result. He was found culpable under a statute proscribing such conduct in terms that could hardly be clearer if drafted in language identical to the proof against him. Any man must know that it is unacceptable to society to create the risk here involved and do absolutely nothing about it.

The petitioner was found guilty of the crime upon proof beyond any reasonable doubt. The trial was lengthy and not perfect, but it was a fair trial. Errors occurring on that trial were precipitated by the defense team and/or were not of sufficient magnitude to warrant objection.

The New York Court of Appeals properly upheld the affirmed conviction entered against this petitioner. That determination was sufficiently based on non-federal grounds so as not to require the invocation of this Court's jurisdiction. Insofar as a question of the constitutionality

of the statute, as applied to this petitioner, may have been decided, it was decided correctly and in a manner consistent with the decisions of this Court. If it was decided, it was a decision based upon the unique facts of the instant case, not likely to have wide effect.

Determination of the fairness of the trial was clearly decided on a non-federal basis, for at no time at trial did the few objections preserved for appellate review rise to constitutional dimension.

The Writ of Certiorari applied for should be denied.

Respectfully submitted,

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